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Citation for published version:

Cowan, S 2013, What a Long Strange Trip It's Been: Feminist and Queer Travels with Sex, Gender and Sexuality. in M Davies & VE Munro (eds), *The Ashgate Research Companion to Feminist Legal Theory*. new edn, Ashgate Publishing, pp. 105-25.

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Peer reviewed version

Published In:

The Ashgate Research Companion to Feminist Legal Theory

Publisher Rights Statement:

© Cowan, S. (2013). What a Long Strange Trip It's Been: Feminist and Queer Travels with Sex, Gender and Sexuality. In M. Davies, & V. E. Munro (Eds.), *The Ashgate Research Companion to Feminist Legal Theory*. (new ed.) (pp. 105-25). Ashgate.

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‘What a Long Strange Trip It’s Been’:

Feminist and Queer Travels with Sex, Gender and Sexuality

*Sharon Cowan*¹

Rosemary Auchmuty has emphasized the risk of trying to define what is meant by feminism – that inevitably in attempting to pin it down one loses as many supporters as opponents (2003: 377, footnote 1). Nonetheless, it is fair to say that the feminist project is often understood as both descriptive and normative: it takes women to have experienced discrimination on the basis of sex, gender and/or sexuality; and it applies a gendered analysis to what are largely understood as gender neutral legal and social arrangements, in order to improve the lives of women (Conaghan 2000). However, the key concepts of sex, gender and sexuality that feminists have employed as frameworks or tools for analysis of inequality have been the subject of much debate and disagreement. The way in which sex, gender and sexuality – and even the term ‘woman’ itself – have been conceptualized by feminists is the subject of this chapter. I will trace the course of the debates over the meaning and significance of sex, gender and sexuality to feminist theorizing. In doing so, the intention is not to summarize the work of every feminist theorist who has offered an analysis of these key concepts, but rather to identify themes that have arisen as feminist theorizing has evolved. Thus, what follows is not a linear inquiry, but rather a thematic analysis, or ‘history of ideas’, of those who have contributed to feminist debates on sexuality, sex and gender. In so doing, I hope to demonstrate that shifts in thinking are ‘connected and overlapping’ rather than ‘purely ... action leading to acrimonious reaction’ (Garber 2006: 82).

The chapter focuses largely on Western feminist thinking, and in particular Anglo-American feminist legal theory, although some contributions of theorists from continental Europe are taken into account. What we will see is that although gender, sex and sexuality have been analysed as discrete concepts, they have also been conceptualized as interwoven and interdependent. Writers from different traditions and theoretical backgrounds have taken distinctly different views on the

¹ I would like to thank the editors, Margaret Davies and Vanessa Munro for their enduring patience and encouragement; Wendy Van Der Neut for excellent research assistance; Helen Buxton and Justina Molloy for proof reading and deleting the metaphors and long sentences; the amazing students and my inspiring co-teacher Gillian Calder in the 2012-13 class ‘Sexual Orientation and the Law’, University of Victoria, Canada, for poking and stimulating my brain; and Sean Morris for always listening.

conceptual relationship between gender, sex and sexuality; this chapter aims to show how these views developed and the tensions and moments of connection that exist across these debates.

Beginning with ‘second wave’ feminism, the chapter will offer an overview of key moments in the sex/gender and sexuality debates. In so doing, it will look at the contributions not only of feminists to these conversations, but also the interventions offered by queer theorists and others, acknowledging, of course, that often work is not easily classifiable as falling into one or other field(s) and that there are many commonalities and intersections between different theoretical positions (Richardson 2006).

Sex , Gender and Sexuality: ‘Second Wave’ Feminism

Sex and Gender

Sex and gender have been the bedrocks of feminist thinking since what has been termed the ‘first wave’ of feminism in the late nineteenth to early twentieth century. As explored by Elsje Bonthuys in this volume, first wave – that is, liberal – feminists claimed that women were discriminated against on the basis of their sex (where sex was understood to mean what we would now call biological sex, as well as those characteristics thought to arise ‘naturally’ as a result of sexual differences between men and women, such as temperament, physical capacities and so on). The proposition that women should have equal access to education and to public life more generally – was a key contribution of first wave feminist activism and theorizing, and was the foundation of campaigns for women’s right to suffrage, and equal access to ownership of property and higher education. It was not suggested that women were the same as men; rather women should have the same rights to public life that men enjoyed.

However, ‘second wave’ feminism brought with it a move to distinguish between sex and ‘gender’ (Oakley 1972, Kessler and McKenna 1978). The distinction, first developed in 1968 by the psychoanalyst Robert Stoller, was utilized as a way of describing the development of gender identity – ‘sex roles’ – as independent from physiology (Eisenstein 1983: 7). Feminists employed the distinction in a more critical way to argue against conventional sex roles, emphasizing the sex/gender opposition as a way of demonstrating that while physiological sex might be innate, gender differences between men and women (that is, femininity and masculinity), which were commonly thought to be

‘natural’ and inescapable, and which provided the basis for differential treatment of men and women, are socially constructed. This gave feminists a way of understanding and theorizing gender as a culturally inscribed practice rather than an inherent trait. Sex might be taken to be biological and therefore determined, but the parameters and content of appropriate gender roles could now be legally and politically challenged.

Building on this, second wave feminist legal theorists began to develop critiques of the law as gendered – that is, male oriented – not only in its formal exclusion of women on the basis of their biological sex (historically as lawyers, as judges, from the vote, and so on) but also in its substance. Because our social world is gendered, they argued, the very culture of the law is also gendered, not only in its concepts and substantive rules (see, for example, MacKinnon’s 1989 argument about the honest belief rule in rape) but also with respect to legal methods, such as defining relevance, and legal reasoning (Mossman 1987). Second wave feminism challenged discrimination on the basis of gender, and brought a focus on issues such as marriage, employment, reproduction, sexual violence and harassment, prostitution and pornography. But the fundamental problem for feminists at this time was the legal and social construction of gender, and the oppression of women’s sexualities.

Gender and Sexuality

Second wave feminists began to theorize sexuality as a core part of the patriarchal oppression of women; as such, gender and sexuality had to be theorized together. Like gender, sexuality was understood to be socially produced – a ‘social rather than natural’ occurrence (Jackson 2006: 38). According to this view, both sexuality and gender emerge not through benign social processes but through the power of male dominance. Radical feminists, such as MacKinnon for instance, argued that categories of difference which are taken as given (such as gender) are often instituted through an exercise of power which leaves some (that is, women) in a less advantaged and more oppressed situation than those who benefit from the existence of such categories (that is, men); and that the division of individuals into categories may itself be the constitution or creation of difference rather than the recognition of ‘real’ difference (MacKinnon 1989: 237, Spelman 1988: 150).

MacKinnon’s work, which was paradigmatic of this era, suggested that women’s sexualities are completely defined and dominated by male sexual culture, a position referred to by Halley (2008: 41)

as ‘power feminism’. Women’s sexuality is culturally prescribed and controlled by the (male) state by various social and legal means, through the ‘seamless web of life and law’ (MacKinnon 1989: 241). MacKinnon’s early theories, which wove a unique tapestry of feminism and Marxism, were particularly influential in this regard, as she claimed that ‘[s]exuality is to feminism what work is to Marxism – that which is most one’s own, yet most taken away’ (1989: 3).² She also made an explicit link between the construction of gender and the construction of sexuality:

Sexuality, then, is a form of power. Gender, as socially constructed, embodies it, not the reverse. Women and men are divided by gender, made into the sexes as we know them, by the social requirements of its dominant form, heterosexuality, which institutionalizes male sexual dominance and female sexual submission. If this is true, sexuality is the lynchpin of gender inequality. (1989: 113)

Gender is therefore a product of the way in which sexuality is constructed by and through social relations – it is a result of patriarchal oppression of women’s sexuality. As we will see shortly, in some respects this echoes the approach taken by other social theorists, such as Michel Foucault; while he did not theorize gender oppression as such, for Foucault, sex itself was produced by discourses of sexuality. For both these approaches then, it is sexuality that plays the most crucial role in grounding our legal and social conceptions of sex and gender.

Other radical feminists, such as writer Andrea Dworkin (1981), also argued that the sexuality women experience is not their own but that which is fantasized by men; their fantasies (such as rape and pornography) become our reality. Pornography is therefore not only the eroticization of the domination/submission relationship that exists between all men and women, but also a ‘means through which sexuality is socially constructed, a site of construction, a domain of exercise’ (MacKinnon 1989: 134). Despite Dworkin and MacKinnon’s imaginative attempts to harness the law to change women’s lives by regulating pornography through the civil law, their approach to the issue of women’s sexualities has been critiqued as over-determinant in its totalism of the cultural effects of power, and underplaying women’s agency (Brown 1995: 89, Smart 1989: 77). MacKinnon’s work in particular has been said to under-theorize, homogenize and generally denigrate both male

² For in-depth and close readings of MacKinnon’s position on sexuality and sexual difference, see Cornell (1993: chapter 5), Halley (2008: 41 and the following pages).

(homo)sexuality and women's heterosexual desire (Stychin 1995: 62, Halley 2008: 65, compare Richardson 1996); and to ignore the institutionally powerful and often negative impact of law upon feminist projects (Brown 1995: 131, Halley 2008: 57). Angela Harris (1990) submitted a powerful critique of the work of MacKinnon, and that of the radical feminist Robin West, as demonstrating a 'gender essentialism' that elided race, and class amongst other things. MacKinnon's thesis also did not seem to take into account, in any meaningful way, the construction of lesbian sexuality.

However, a distinct lesbian feminist analysis of gender and sexuality did begin to emerge during the second wave. Lesbian feminists challenged mainstream feminist legal theory as being inherently heterosexual in its erasure of lesbian sexuality (Cain 1990), arguing that women's sexualities were overshadowed by the cultural, legal and political institution of heterosexuality, and the status of *being* a lesbian was believed to be the antithesis of heterosexuality. Adopting the identity of a 'woman-identified-woman' was perceived as the political solution, whether or not women chose to express this identity in a sexualized way (Eisenstein 1983: 53–54).

Embracing this approach, in 1980, Adrienne Rich published a 'landmark essay' (Fuss 1989: 47) entitled 'Compulsory Heterosexuality and Lesbian Existence' in which she argued that much feminist scholarship assumed female heterosexuality and ignored lesbian existence (1983: 178–182), thereby also neglecting the reality that heterosexuality is, by a variety of means, 'forcibly and subliminally imposed on women' (1983: 195). Rich argued that compulsory heterosexuality also serves to ensure the invisibility or at least deviant status of lesbian experience in the social world (1983: 185, 191). Unlike MacKinnon, however, Rich does not overstate male power, or share her view of the inevitability of male (heterosexual) culture's impact upon women; Rich attempts to describe the many ways throughout history in which women have evaded heterosexuality: 'everywhere women have resisted it, often at the cost of physical torture, imprisonment, psychosurgery, social ostracism and extreme poverty' (1983: 195–196).

Rich claimed that all women's authentic sexualities and experiences appear on a 'lesbian continuum' such that each woman has a range of 'Woman-identified experiences' throughout her lifetime, experiences that are not confined to genital sexual contact between women (1983: 192) and that are undermined by the institutions of heterosexuality (1983: 201), institutions which in turn are

maintained through both physical violence and psychological control or ‘false consciousness’ (1983: 192). The aim then is to challenge the ‘lie’ of *compulsory* heterosexuality (199). For Rich and other lesbian feminist theorists, it is the coercive imposition of heterosexuality that produces gender; but while heterosexuality is understood as socially enacted, lesbianism is implied as a possibility that exists innately in all women (Jackson 2006: 46).

This kind of lesbian feminist theory has been critiqued as essentialist and ahistorical in its portrayal of a fundamental and authentic lesbianism which is different to, and oppressed by, compulsory (male) heterosexuality. Furthermore, in its adherence to the gender binary, Rich’s work distinguishes what it means to be lesbian from the gay male experience; Diana Fuss critiques Rich as ‘curiously unable to theorize male homosexuality outside of its popular negative stereotypes’ (Fuss 1989: 47). However, Cheshire Calhoun suggests that this reading back into history the existence of lesbian identities provides a ‘useful essentialist fiction’ in that it demonstrates that there is nothing natural about the way in which our contemporary heterosexual ‘law’ (both formal and informal) is constructed, and reveals the way in which women over time have broken heterosexual and patriarchal law (1993: 1872–1874).

Rich’s redefinition of lesbian experience was certainly controversial (Eisenstein 1983: 56), and fundamentally challenged the heterosexual assumptions of mainstream feminism, as well as medical conceptions of lesbian sexuality, and fostered heterogeneity in the movement (Stein 1992: 39). However, as will be explored further below, and unlike later feminist and queer theoretical engagements with law, the analyses of key feminists such as Rich and MacKinnon have been said to wrongly prioritize sexuality as the primary site of oppression (Jackson 2006: 46–47). Over-privileging sexuality as the site of women’s oppression, and therefore as the cornerstone of feminist analyses, is said to neglect other aspects of gender inequality (non-sexual social practices of heterosexuality) such as labour (Jackson 2006: 46). Stevi Jackson, for example, has argued that although the two are empirically interrelated, gender should be prioritized since logically it precedes sexuality, and is a binarised, hierarchical practice of social division, which, like class, is structurally ‘embedded in both social institutions and social practices’ (2006: 41).

The ‘sexuality as constitutive of gender’ theorists have also been accused of neglecting the ways in which sexuality and gender could usefully be analysed separately, and how sexual oppression could be said to be a site of power/resistance outwith the confines of its relationship to gender oppression. For example, Gayle Rubin argued in 1984 in her influential article ‘Thinking Sex’ for ‘a radical separation of gender and sexuality’ (McLaughlin et al 2006: 1). Indeed, Rubin has been credited with having ‘shaped the field of sexuality studies’ (Stryker 2011: 82). Having first coined the term ‘sex/gender system’ in 1975 to describe the processes by which women are caught in a nexus of expectations and constraints by way of both nature (biology) and culture (socialization), Rubin went on to critique the hegemonic, conservative ‘orthodoxy’ of feminist work on sexuality (Richardson 2006: 25). Rubin categorized the work of anti-pornography radical feminists (such as MacKinnon) as ‘sex-negative’, and in direct contrast to her own ‘sex-positive’ analysis of the systematic exclusion of non-normative sexualities and sexual practices. During the ‘sex wars’ of the 1980s, when feminists most vehemently disagreed over crucial issues such as pornography, prostitution and sadomasochism, debates around the appropriate regulation of sexuality became heated and divisive, and Rubin, along with other feminists such as Carole Vance, Pat Califia and Joan Nestle undertook critical engagement with radical feminist perspectives, the result of which was a movement cleaved into two distinct camps (Rubin 2011, Vance 1984). As Susan Ardill and Sue O’Sullivan recall (2005: 109), you were either for sexual liberation or for women’s liberation, you could not be for both.

Although criticized as going ‘too far in denying the empirical connections between gender and sexuality’ (Jackson 2006: 47), Rubin’s contribution was important in grounding later ‘queer’ and postmodern feminist work, discussed below, that argued for the analysis of sexuality that was not *necessarily* grounded in feminist theory (see also Halley 2008). Likewise, the work of Eve Kosofski Sedgwick foregrounded the development of queer perspectives on the particularity of sexuality as discrete from gender studies: ‘the whole realm of what modern culture refers to as “sexuality” and *also* calls “sex”... is virtually impossible to situate on a map delimited by the feminist defined sex/gender distinction’ (Sedgwick 1990: 29).

Notwithstanding the work of Rubin and others, aimed at undermining mainstream feminist orthodoxies, much of feminist work at this time was largely focused on sexuality as the dominant and

oppressive force in women's lives. Rich's focus on (hetero)sexuality as the primary site of oppression and her suggestion that all women are potentially lesbians was said to over-generalize and elide differences *among* those women/lesbians, including differences of class and race (Fuss 1989: 44, Harris 1990). This charge – universalism – has also been made, as noted above, against other radical feminists including MacKinnon and Dworkin, and is based on the tendency of such feminist arguments to assume a universal experience of sexuality and gender without accounting for the ways in which women's experiences are mediated through other 'identity markers' such as race, class, disability, religion and so on.³ However, as we will see shortly, the central question of *sexual* difference continued to preoccupy many feminists for some time to come.

Emphasizing or Eradicating Sexual Difference?

Sexual Difference Feminism: Luce Irigaray

MacKinnon's 'power feminism' (Halley 2008: 41) sees sexuality, and thereby gender differences, as constructed by and through male oppression, a view that Halley describes as 'a dark vision of wall to wall domination' (2008: 72). At the same time, however, another strand of 'second wave' feminism stresses the importance of *sexual difference* between men and women, arguing that women's accounts and experiences of the world have been repressed, ignored or devalued, and that more attention must be paid to this fundamental sexual difference, both in law and in the social world more generally.

The problems of recognizing and naming female sexuality in particular are discussed at length by the Belgian feminist, Luce Irigaray. Strongly influenced by (and critical of) psychoanalytic theories, particularly those of Lacan and Freud, Irigaray critiques the existing system of 'patriarchal law' (1994: 14–18), and develops the idea of a 'civil law for women' (19–63, 67–87), that includes 'a civil offence to depict women's bodies as stakes in pornography or prostitution' (75). This will allow women, among other things, the right to human dignity, including 'an end to commercial use of their bodies or images' (Irigaray 1994: 60).

³ On how to avoid universalizing while maintaining political unity, see Young (1997). Feminist legal theorists have also turned to intersectionality to address the ways in which differences between and among women interact in complex ways: see Nash (this volume) and Bonthuys (this volume).

For Irigaray, politics and social change must be based on the recognition that women and men are fundamentally different:

The human species is divided into *two genders* which ensure its production and reproduction. To wish to get rid of sexual difference is to call for a genocide more radical than any form of destruction there has ever been in History. (1993: 12, emphasis added)

The legal system, then, must be grounded in sexual difference, and rights and obligations must be rewritten to reflect this (1993: 13); the current system does not promote equality because it does not take sexual difference into account (1993: 84). The oppression of women through law and other social and cultural forces is an important issue but legal change must be accompanied by changes to our 'symbolic codes' such as language and religion (1994: 112), particularly the former since 'the organisation of the law reflects that of the language and vice versa' (1994: 41). Language for Irigaray is sexed and is 'neither universal nor neutral' (1993: 30), but has a sexuality that is male-defined and reflects male desire (1994: 32–33); women therefore lack the ability to speak, think, desire or imagine for themselves (1985a: 224).

Language is to Irigaray what law is to MacKinnon: apparently neutral but inherently male, and a dominant force in the construction of women's sexuality. Irigaray argues that within a masculinist linguistic system, the feminine is altogether *excluded*: women are unrepresentable and unthinkable, comprehensible only within male terms (Butler 1990: 9). To define female sexuality, to try to discover and give voice to female sexuality within the existing language system would be dangerous. Irigaray would rather resist a definition of female sexuality within this system; to do so would be to 'speak like men' (1985a: 78). Any practical gains that women have made this century have been due to their ability to take on a kind of male identity and to make themselves as much like men as possible (Irigaray 1994: 79). For Irigaray, this is not equality. In emphasizing the value of all that is feminine, Irigaray can be described as what Halley calls a 'cultural feminist' (2008: 58–59).⁴ In her call for a distinct female voice and language, she is 'trying to "imagine the unimaginable"' (Whitford 1991: 22).

⁴ See also Eisenstein (1983) for an analysis of second wave 'cultural' feminists who adopted the view that female sexuality was superior to that of the male.

While MacKinnon believes that women are portrayed as different to men, and that this difference is not only culturally constructed but is the bedrock of inequality and male dominance, the very point of Irigaray's work is to demonstrate the ways in which discourse 'sames' women – that is, makes them the mirror image of men – hence Irigaray's call for the creation of a language for women, in order that they might speak and be heard, and be recognized as distinctly *female* subjects. In this view of the world, woman is not 'other' as part of a symmetrical binary system which privileges the first term (for example, subject/object or masculine/feminine), but is what Braidotti calls 'radically and positively other' (1994: 121).

Since Irigaray's analysis appears to rest on a binary model of two-sexed sexual difference, it has been argued that her concentration on sexed difference operates to demote other differences such as race, ethnicity or sexuality (Davies 1997: 43, Lacey 1997: 70).⁵ Margaret Davies suggests that although Irigaray's gesture may be 'strategically useful' it is not necessarily 'a solution' since 'two sexes are, in any case, as oppressive to those who do not simply identify with one sex or the other or whose identifications do not fit their bodies, in the same way that the archetypal legal man is, broadly speaking, oppressive to women' (Davies 1997: 44). Katherine O'Donovan claims that the value of Irigaray's work is rhetorical rather than definitional (1997: 52), but according to Nicola Lacey, even as a rhetorical strategy it is not sufficiently reflexive and can be read as essentialist rather than transformative (1997: 69, 71). This is because Irigaray's specific recommendations may echo ahistorical stereotypical notions of the feminine and 'resonate with a conception of woman which is uncomfortably close to that of patriarchal social institutions, and which feminism has generally sought to undermine' (Lacey 1997: 70).

Ultimately, however, Irigaray's work had a fundamental impact on feminism and the sex/gender and sexuality debates. Her belief in the possibility of women's subjectivity and sexuality, of 'the positivity of sexual difference' (Braidotti 1994: 121), has proved to be a major challenge to discourses of law, psychoanalysis, science, linguistics and beyond. On the other hand, feminists wishing to eradicate

⁵ Irigaray is sometimes labelled as essentialist; others have categorized her work as 'radical materialism'. For discussion of this claim, see Whitford (1994: 51).

sexual difference altogether, such as Monique Wittig, have also made a significant contribution to the field.

The Rejection of Sexual Difference: Monique Wittig

Rich's argument that all women could experience lesbianism to various degrees contrasts with that of Monique Wittig, a French materialist feminist theorist claiming a distinctly lesbian perspective, who controversially claimed in 1978 that lesbians were not women, primarily because "'woman" has meaning only in heterosexual systems of thought and heterosexual economic systems' (1992: 32). Analogizing sexuality and class, and echoing the work of Simone De Beauvoir, Wittig argued that women only exist in relation and opposition to men; therefore, lesbians are not women because they do not relate to men 'economically, politically or ideologically' (1992: 20; see also Delphy 1970). Both Wittig and Rich question heterosexuality as a political regime, one that is forced upon women through a variety of social and legal means, and which women have internalized. But Wittig resists what she sees as previous lesbian reliance on and celebration of women's 'difference' from men (1992: 10), maintaining that such an approach simply replaces patriarchy with a similarly oppressive matriarchy. Strongly influenced by Marxism, Wittig uses the analogy of class to suggest that the power struggle between men and women should lead to the abolition of the system of sexual difference. Similarly to MacKinnon, she believes that there is nothing ontological about difference, that dominance is not a product of difference. Rather, difference is that which disguises dominance: it is simply the (heterosexual) male interpretation of domination:

What is the different/other if not the dominated? For heterosexual society is the society which oppresses not only lesbians and gay men, it oppresses many different/others, it oppresses all women and many categories of men, all those who are in the position of the dominated ... The function of difference is to mask at every level the conflicts of interest, including ideological ones (1992: 29).

However, for Wittig, in direct contrast to MacKinnon's approach, it is *gender* that produces a binary system of sexuality. And while Irigaray celebrates the possibility of creating a positive femininity and female sexuality, for Wittig 'the task is ... to displace the binary as such through a specifically lesbian

disintegration of its constitutive categories' (Butler 1990: 126).⁶ Concepts such as sex, gender, man and woman all contribute as 'categories of oppression' to a heterosexual regime (Wittig 1992: 77). Wittig's goal is to eradicate the categories of sex and gender so that our language system – and therefore the construction of the subject – becomes gender neutral. Consequently, men and women as such have to disappear 'politically, economically, ideologically'. If lesbians and gay men describe themselves as men and women, 'we are instrumental in maintaining heterosexuality' (1992: 29).

The answer for Wittig, then, is not to harden the existing categories through establishing lesbian and gay communities with corresponding legal rights and identities but to destroy these very categories themselves. We must therefore go beyond sex, even so far as 'rejecting all sciences which still use these categories as their fundamentals (practically all social sciences)' (1992: 19–20). In Wittig's view then, there is no escape for women from this heterosexual bind, unless we replace the current social, legal, economic and political system with a completely different alternative, as defined by a lesbian perspective. Such an alternative system would not, however, be predicated on biological asymmetry. Since categories of sex/gender are forced upon us as social realities when in fact they are constructions, the only way to achieve change is to dismantle our discourses on sex and gender and to reconceptualize sex, gender and sexuality without relying on difference, particularly biological difference (Butler 1990: 113).

Fuss (1989: 44) suggests that both Wittig's contention that lesbians are not women, and Rich's suggestion that in effect all women are (potential) lesbians, are equally unconvincing. Rich's definition of lesbian is too vague and inclusive, while Wittig's is too exclusive and reified. Nonetheless, Wittig's radical, lesbian, social constructionist, materialist philosophy offers a unique perspective on the debate around the meaning of sex, gender and sexuality as well as 'an experience beyond the categories of identity, an erotic struggle to create new categories from the ruins of the old, new ways of being a body within the cultural field, and whole new languages of description' (Butler 1990: 127). Post-second wave feminism, however, has begun to more closely interrogate the meaning of sexual difference, as well as the taken-for-grantedness of the biological and legal basis of sex itself.

⁶ On the possibility of a distinctly lesbian legal theory, see Robson (1998).

Sex, Gender and Sexuality: After the Second Wave

Sex and Sexuality

That the sex/gender distinction is now commonly accepted as part of mainstream legal thinking is aptly demonstrated by the following quote from the English Court of Appeal decision in the transgender case *Bellinger v Bellinger*:

The words 'sex' and 'gender' are sometimes used interchangeably, but today more frequently denote a difference. Mrs. Cox [Mrs. Bellinger's lawyer] submitted that gender was broader than sex. Her suggested definition was that 'gender' related to culturally and socially specific expectations of behaviour and attitude, mapped onto men and women by society. It included self-definition, that is to say, what a person recognised himself to be. ([2002] Fam. 150 at 160)

Notwithstanding the proliferation of feminist theorizing around gender and sexuality, the concept of sex has largely, until relatively recently, been left out of the picture. As the sex/gender distinction became 'mainstreamed', feminist legal and social theory moved on. Critics began to suggest that the sex/gender distinction implies a questionable biological essentialism and binarism about sex (McNay 1992: 22). Although gender roles and scripts were fundamentally challenged by the separation of sex and gender, the distinction left the body languishing in the 'natural' realm of biology. It also linguistically and conceptually separated sex from gender in a way that sits uneasily with many contemporary feminist theorists (McNay 1992: 23).

Much feminist scholarship has therefore now challenged the 'sex versus gender' approach, contesting not only the naturalness of sex, but the relationship between sex/gender, and their relationship to the concept of sexuality. However, in order to explain how this more recent strand of feminist thinking on sex–gender–sexuality has evolved, we must pause to first say a few words about the work of Michel Foucault, which has been enormously influential on subsequent feminist (and other) theories of sex, gender and sexuality.

Foucault: The History of Sexuality

Foucault's impact on theories positing the construction, as opposed to naturalness, of sex and sexuality, has been widespread and profound. The first volume of his three-volume text *The History of Sexuality* was published in France in 1976, and translated into English in 1978. Foucault was one of

the first to discuss the way in which sexuality is produced (as is all knowledge) through the exercise of different levels and types of power.⁷

Foucault argues that ‘sexuality is the set of effects produced in bodies, behaviours and social relations by a certain deployment deriving from a complex political technology’ (1984: 127). Sexuality is not what we think it is: it is not an inherent or innate drive or orientation which can be repressed by power, or is ‘disobedient’ to a power ‘which exhausts itself trying to subdue it and often fails to control it entirely’ (1984: 103). Sexuality is a production of and through power, a ‘transfer point for relations of power’ (1984: 103). It is a ‘historical construct’ rather than a ‘natural given’ or ‘furtive reality’. The ‘proliferation’ of various discourses and knowledges on sexualities is evident, according to Foucault, within a wide range of fields such as medicine, law and psychiatry (1984: 103). He argues that sexuality became linked with what he calls the ‘bio-politics of the population’, through control of reproduction, marriage, health, morality and so on (1984: 139). Through the crucial notion of ‘bio-power’, Foucault explains how ‘knowledge-power’ has come to affect bodies (1984: 143), such that ‘[P]ower and sexuality are not ontologically distinct, rather sexuality is the result of a productive “biopower” which focuses on human bodies, inciting and extorting various effects’ (McNay 1992: 29).

For Foucault, sex is the concept that binds together lots of different elements of our bodies: ‘anatomical elements, biological functions, conduct, sensations, and pleasures, and it enabled one to make use of this fictitious unity as a causal principle, an omnipresent meaning, a secret to be discovered everywhere: sex was thus able to function as a unique signifier and as a universal signified’ (1984: 154). Foucault rejects any distinction between sex as natural and sexuality as construction; rather sex is bound up with the way in which bodies (and therefore the species) are regulated through power. Sex is therefore a ‘regulatory construct’ (McNay 1992: 29).

According to Foucault then, not only is sexuality a product of (classed) power relations, but sex is too. Sex does not precede sexuality; rather the reverse is true – the deployment of sexuality is part of the exercise of power that produces sex. Therefore, we cannot say that sex is real and sexuality a

⁷ Note also the significance of the work of the UK-based scholar Jeffrey Weeks (1981, 1985) during this period. For discussion of the implications of Foucault’s arguments for scholarship focusing on racialized sexualities and on critiques of capitalism, see Ferguson (2004).

construct; rather we must demonstrate that sex is a product of sexuality – ‘sexuality is a very real historical formation; it is what gave rise to the notion of sex’ (1984: 157).

Notwithstanding some robust feminist critiques of Foucault’s failure to theorize gender, or women’s inequality (Fuss 1989: 107, McNay 1992: 33–35, Sawicki 1991: 29), some theorists, building on this Foucauldian perspective, have argued that rather than juxtaposing socially produced gender with natural biological sex, we can begin to understand sex itself (the interpretation of bodies) as historically and socially constructed (Laqueur 1990). More than that, sex, or sexed bodies, are produced through discourses about gender and sexuality. For example, as we shall see shortly, Judith Butler applies a Foucauldian analysis to gender in order to show how the concept of gender produces sex – that is, that the practice of seeing only two ways of doing gender produces two biological sexes (see also Hird 2002: 588). These shifts in feminist thinking have been in part brought about by the advent of postmodern and distinctly ‘queer’ perspectives that posit a pluralistic rather than binary system of sex/gender and sexuality.

Sexes, Genders and Sexualities

Feminism and Queer Theory

Notwithstanding Jackson’s claim that ‘it is feminists for whom there is most at stake in emphasizing the connections between gender and sexuality’ (2006: 46), ‘queer’ analyses of sexuality began to emerge in the late 1980s.⁸ The roots of queer theory are in social construction theory (predominantly that of Foucault as described above), feminist theory and post-modernism, particularly the deconstruction of identity and subjectivity. The central theme is a challenge to rigid binaries and categories, and a move away from grand theory in favour of many local interlocking social and legal struggles and theories – or ‘strange affinities’ (Hong and Ferguson 2011). Queer theory as a discrete perspective developed also in answer to some of the critiques of second wave feminism as universalizing (Richardson 2006: 19). Richardson, among others, has argued that queer feminist perspectives on sexuality, particularly that of Butler, were born in part from the insights extended through Rich’s focus on compulsory heterosexuality,

⁸ Feminist analyses of gender have also broadened to include masculinity studies but this is beyond the scope of the present chapter. See, for example, Davis, Evans and Lorber (2006) and Dowd (2008).

and Wittig's deconstruction of gender (2006: 30, Garber 2006: 84–85). Stychin also attributes the emergence of queer at least partially to the defeat of the civil rights approach, epitomized by the defeat of pro-gay immutability arguments in the 1986 US case of *Bowers v Hardwick*, which upheld the criminalization of 'sodomy' in Georgia; when the assimilationist 'we are the same' argument failed so dramatically, some gays and lesbians began to re-appropriate 'otherness' (1995: 149, 151).

Queer theorists have challenged feminism to take the social constructionism of gender and sexuality one step further, to explore the ways in which all kinds of (elements of) identities, including sex are fractured and 'contingent', and to question the binary categories of male and female – that is, the assumption that gender was constructed but somehow sex was not. Queer also poses the possibility of a multiplicity of sexes, genders and sexualities, rather than arguing simply for the destruction sex/gender and sexuality altogether. However, multiplicity does not necessarily mean a wholesale dismissal of identity categories or rights-based claims. As Vanita argues with respect to sexuality-based civil rights claims in India, categories may still be necessary in some contexts despite (and alongside – see Butler 1993: 222 on the 'double gesture') the queer rejection of identity politics (2002: 5, cited in Garber 2006: 81).

The queer movement has had a significant impact on the theory and practice of sexual politics. Queer theorists have helpfully disaggregated sex/gender in sexuality in a way that allows them to be analysed separately, and thus for sexuality to be the focus of study beyond the question of sex/gender. One theorist who has had a remarkable influence in this area, weaving together elements of feminism, queer theory and a postmodern approach more generally is Judith Butler. Adopting a more fluid and pluralistic account of gender than the binary model of her feminist predecessors, Butler's central argument is that gender is 'performed'.

Gender, Performance and Performativity

So how is gender performed? In the same way that 'woman itself is a term in process ... an ongoing discursive practice' (1990: 33), gender is not a natural trait but an effect of discourse, and performed in the sense that it is a '*stylized repetition of acts*' (1990: 140), that 'congeal over time' (1990: 33), rather than a concrete stable and immutable identity. Butler describes in detail the way in which gender is a construct, and is 'performed':

Because there is neither an “essence” that gender expresses or externalizes nor an objective ideal to which gender aspires, and because gender is not a fact, the various acts of gender create the idea of gender, and without those acts, there would be no gender at all. Gender is, thus, a construction that regularly conceals its genesis; the tacit collective agreement to perform, produce, and sustain discrete and polar genders as cultural fictions is obscured by the credibility of those productions ... the “construction” compels our belief in its necessity and naturalness. (1990: 140)

According to Butler there is no biological pre-existing sex through which gender and sexuality emerge. Rather, ‘gender is a performance that *produces* the illusion of an inner sex or essence or psychic gender core’ (1991: 28). For her, ‘sex is an ideal construct which is forcibly materialised through time ... thus ... one of the norms by which the “one” becomes viable at all, that which qualifies a body for life within the domain of cultural intelligibility’ (1993: 1–2). Thus, compulsory heterosexuality and its accompanying gender norms produce, as effects, categories of sex and sexuality (1990: 139–140, 1991: 24). Sex and gender are both what she calls ‘regulatory fictions’ (1990: 33).

As Butler herself clarified in 1993, performance is not about taking on the garb of a particular elected gender at whichever moment one chooses – in fact it is not really about choice at all, since the range of garments – the language and tools of gender – available to us are already proscribed within society (1993: 187). Butler also explains (echoing Wittig) that without homosexuality, heterosexuality would not exist (Butler 1991: 13). In order to make clear their boundaries, categories must be defined in opposition to (constituted through) something and therefore those opposites are *necessary*; performativity therefore has normative force through both reiteration, and exclusion (Butler 1993: 188).⁹ However, unlike Wittig, Butler does not believe that existing heteronormative concepts of sex and gender can simply be destroyed; only the proliferation or parodying of sex/gender is possible (compare Jeffreys 1994) because there is no possibility of agency ‘*outside* of the discursive practices that give those terms the intelligibility they have’ (1990: 148, emphasis added).¹⁰

⁹ See also Butler (1993: 249 at fn. 3), McNay (1992: 138), Halperin (1995: 44).

¹⁰ Jackson (2006) critiques Butler’s reading of Wittig as neglecting her all-important materialism. For Butler’s take on materialism, see generally Butler (1993). For discussion of whether queer theory general can address questions of materiality, see McLaughlin (2006: 63–64).

Butler critiques MacKinnon's conflation of sexuality and gender as 'highly deterministic' since it inhibits the theorization of sexuality apart from gender difference, and the study of 'kinds of sexual regulation that do not take gender as their primary objects' (1993: 239, see also Halley 2008). On the other hand, Butler argues, it is not desirable to completely separate gender from sexuality (1993: 5). Both feminism and queer theory take sexuality as their primary point of analysis and accept their 'constitutive inter-relationship' (1993: 240). In order to bring them closer together, Butler recommends that this 'opposition' between sexuality and gender needs to be reconceptualized, as does the complex relationship between sexuality, gender and other fields of power such as race (1990: 240). So, while heterosexuality and gender norms are closely linked, sexuality does not determine gender and vice versa. It is important, therefore, to recognize the importance of gender as distinct from sexuality, but in a way that accepts its centrality to the regulation of sexuality: neither one should be privileged over the other, but we ought to recognize the 'non-causal and non-reductive connection between sexuality and gender' (1993: 238).

Butler argues here that emerging feminist and queer theories should not focus on whether sex/gender or sexuality is prior, or more important, but rather on the relationship between these concepts. But some feminists have questioned what they see as a universalizing tendency within queer theory/politics that ignores feminist concerns about gender, lesbian sexuality (Walters 1996: 845–846, Jeffreys 1994: 174) and race (Samuels 1999, Ferguson 2004); as well as the content and structure of heterosexuality (Jackson 2006: 39). These deep-seated issues of universalism versus particularity have been especially acute in recent conversations about transgender politics and gender pluralism (Monro 2007), which have also, importantly, posed difficult questions for feminism about what it means to be a woman.¹¹

'Next Wave' Feminism, Transgender Feminism and Gender Pluralism

Contemporary transgender activism and theory dispute the finality and inflexibility of male/female boundaries, and hence categories of sexual orientation (Monro 2007). In Butler's words, '[t]here are humans ... who live and breathe in the interstices of this binary relationship, showing that it is not

¹¹ For an early discussion of these issues in the legal context, see O'Donovan (1985).

exhaustive; it is not necessary' (2004: 65).¹² However, feminism and transgender politics have not had an easy relationship. Surya Monro (2007: 125) suggests that this is in part because of an inclination among feminists to adhere to dyadic female/male categorization. An absolutist commitment to a dual and rigid classification system has also expressed itself through law: as Sally Hines has argued, '[a]lthough the law now allows for movement *across* the binary of male/female, the spectrums *in-between* male and female, such as transgendered, intersexed, bigendered and androgynous, remain outside current frameworks of citizenship' (2007: para 1.3).

What is more, some feminists have argued that transgender people's struggles to be socially and legally accepted have in fact undermined the foundational concept of womanhood, upon which feminist struggles for equality are based; some have gone as far as to suggest that trans women are in fact men who have attempted to infiltrate women-only spaces (Raymond 1979). Others have argued strongly against women's equality and rights campaigns as inclusive of trans women's rights, either on the basis of sex, that is, a rigid biological binary, or gender, because of the significance of socialization as a woman (Boyle 2004).

On the other hand, notwithstanding Susan Stryker's question as to whether or not queer can 'adequately account for the transgender phenomena' (2011), Monro (2007: 142) has argued that queer-inspired gender pluralisms and an 'alliance-based politics' offer alternatives to the sex/gender binary and single issue politics of feminisms of the past. Similarly, Halberstam (2006: 97) has posited the possibility of 'transgender feminism' as 'the exciting potential of a merger of trans and feminist politics'. Such a merger could enable 'next-wave feminists' (Halberstam 2006: 103) to establish or further common projects and goals that do not reify theory or practice (on the productive tensions and 'contradictory tendencies' of transgender politics see Halberstam 2012 and Cowan 2009).

That there are some common feminist/trans goals seems incontrovertible. The constraining heteronormative assumptions and ideologies about sex and gender that underpin the dominant medico-legal and social discourses on what it means to be trans also shape the sexed/gendered lives of cisgender people. Maleness and femaleness, as medico-legally understood, seems always to implicate

¹² See also the important work of scholars examining ways in which the bodies and experiences of intersex people confound heteronormative binary sex/gender assumptions: Kessler (1998); Fausto-Sterling (2000).

normative ideals of heterosexuality (not homo-, bi-, a-, or poly-sexuality); monogamy (not polygamy or polyamory); marriage (rather than non-marital relationships); conjugality (rather than intimacy or friendship); life-long commitment (rather than short-term, casual, or intermittent connections); dual (rather than solo or multiple) systems of partnership; and family life (based on the primacy of relationships with children, spouses, and relatives rather than friends, workmates, neighbours or non-spousal intimates).

Each of these ideals reflects the deeply embedded existing heteronormative social and legal structures that permeate not only legal and political debates about trans issues, but about the politics and lived experiences of sex/gender more broadly; as such, they raise crucial questions for all critical analyses of law and the material social world around us. Contesting gender is not (solely) about ‘individual gestures of dissent’ but involves ‘a collective process (of) social struggle’ (Connell 2009: 110). As the critical trans scholar Dean Spade has recently argued (and as Carol Smart also suggested in 1989), this often means decentring law, and instead employing, indeed centring, non-legal community based strategies and striving for a shared imagination of transformative change (2011: 156). Accordingly, as I have argued elsewhere (Cowan 2009), it is important for feminists – indeed everyone interested in theorizing sex/gender and sexuality and their intersection with other vectors of human experience – to fully engage with the questions and debates raised by the ways in which transgender people’s lives are legally and socially regulated.

Conclusion: Moving Forward and Gladly Beyond?

No one term can serve as foundational. (Butler 1993: 240)

This chapter has traced the emergence and evolution of feminist theorizing about sex, gender and sexuality. So how should contemporary feminists and others conceptualize sex/gender and sexuality? Butler has critiqued the ways in which gender discourse ‘absorbs and displaces “sex”’ (1993: 5), but although we may wish to avoid conflating the two, Lois Bibbings has identified how difficult it is ‘(linguistically and conceptually) to analyze the concepts “sex” and “gender”. If they are so interwoven, would it not be more accurate to talk of sex and gender as one thing?’ (2004: 223–224).

As we have seen, feminist and queer theorists have taken different views on whether or not sex and gender are separable, and which, if any, should take analytical precedence. The underlying message of more recent arguments seems to be that despite heuristic advantages of separation, sex, sexuality and gender cannot be completely disaggregated, and to attempt to do so ‘may restrict rather than enhance our efforts to theorise the complex intersections’ (Richardson 2006: 27). Moreover, as Harrison notes, ‘there will never be any natural experiment in which we might find out what the sexed body entails entirely outside the ways in which it, and the person whose body it is, has been gendered’ (2006: 43). And, as contemporary feminist and queer theorists have argued, sex/gender and sexuality are linked not only through the oppositional homo/heterosexual binary, but also because ambiguity about sex/gender throws our expectations about sexuality into confusion, and vice versa.

Initial concerns were raised that queer theory would neglect race or gender politics. Yet, queer theory has clearly had a major impact on contemporary feminism’s treatment of sex/gender and sexuality, and race. Recent queer of colour analyses, for example, have brought questions of the racialization of desire more centrally into focus (Hong and Ferguson 2011, Holland 2012, Ferguson 2004). Likewise queer crip studies offer provocative and rigorous analyses of the intersection of heteronormativity and norms that discipline the disabled body (McRuer 2011, McRuer and Samuels 2003). Queer theories can therefore offer another set of tools, overlapping with, yet distinct from, feminism, to view the ways in which sex/gender and sexuality remain central features of contemporary social and political life, and how they are interwoven with other aspects of material embodiment. Like feminism, queer theory may need to be continually rewritten, but both can offer a platform from which to make connections with other critical social theories such as critical race theory and crip studies. Moving away from the characterisation of feminism as the study of sex/gender and queer as the study of sexuality, then, we can see each theoretical enterprise as having overlapping territories (Richardson 2006: 26, Cossman 2003–4), where both have resonance and relevance for contemporary theorizing on sex/gender and sexuality and beyond.¹³

¹³ On the question of the relationship between feminist legal theory, and ‘Law, Gender and Sexuality Studies’, see Conaghan (2009).

As feminism acknowledges the queer critique and tries to more readily accommodate an analysis of *sexuality* which cannot be reduced purely to *gender*, or vice versa, so will feminism encourage queer theory to acknowledge the relevance of gender politics to analyses of sexuality and desire (MacIntosh 1993: 49). The future for feminism and for queer theory may well lie in ‘the articulation of *new ways of thinking* about how sexuality and gender’ – and, we might add, sex, race, class and physical embodiment – ‘are profoundly interconnected’ (Richardson 2006: 36, emphasis added). In turn this may lead us to consider the possibility of ways of being ‘which we do not yet know how to name or that sets a limit on all naming’ (Butler 2004: 74).

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